



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

DEC 1 4 2004

CERTIFIED MAIL
RETURNED RECEIPT REQUESTED

Paul E. Sullivan, Esq.
Sullivan & Associates, PLLC
1010 Wisconsin Avenue, NW
Suite 725
Washington, DC 20007

RE. MUR 5410
James D. Oberweis
Oberweis for U.S. Senate 2004 and
Richard G. Hawks, as treasurer

Dear Mr. Sullivan.

On February 23, 2004, the Federal Election Commission notified your clients, James D. Oberweis, Oberweis for U.S. Senate 2004 and Richard G. Hawks, as treasurer, ("Oberweis Committee"), of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint and information provided by your clients, the Commission, on November 30, 2004, found that there is reason to believe that the Oberweis Committee violated 2 U.S.C. §§ 441b and 434(b). In addition, the Commission found that there is reason to believe that James D. Oberweis violated 2 U.S.C. § 441b. At the same time, the Commission also found that there is no reason to believe that your clients violated 2 U.S.C. § 441b in connection with the ice cream "meet and greet" and the sweepstakes. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter to the General Counsel's Office within 15 days of receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred.

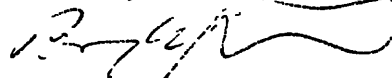
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Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

If you have any questions, please contact Dominique Dillenseger, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read 'Bradley A. Smith', with a large, stylized flourish extending from the end of the signature.

Bradley A. Smith
Chairman

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: James D. Oberweis
Oberweis for U.S. Senate 2004, Inc. and
Richard G. Hawks, as treasurer

MUR: 5410

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission ("the Commission") by Tim Timoney, Chairman of the Democratic Party of Sangamon County. See 2 U.S.C. § 437g(a)(1).

The complaint alleges that Oberweis Dairy, Inc. ran coordinated television advertisements featuring James D. Oberweis and targeting Illinois voters within 120 days of the March 16, 2004, primary election. Oberweis Dairy is a family-owned business that processes and delivers milk products directly to homes in Illinois, Indiana, and Missouri, and maintains 32 ice cream and dairy stores in the Chicago and St. Louis metropolitan areas. Mr. Oberweis is Chairman of Oberweis Dairy and was a 2004 candidate for U.S. Senate in Illinois. Oberweis for U.S. Senate 2004, Inc. is the principal campaign committee of James D. Oberweis and Richard G. Hawks is its treasurer.

II. FACTUAL AND LEGAL ANALYSIS

Under the Act, corporations may not make contributions "in connection with" a federal election and corporate officers may not consent to such contributions. 2 U.S.C. § 441b(a). Moreover, federal candidates and political committees may not knowingly accept or receive such contributions. *Id.* A contribution includes a gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing a Federal election. 2 U.S.C. § 431(8)(A)(i). The term "anything of value" includes in-kind contributions. 11 C.F.R.

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§ 100.52(d)(1). Each report filed by a political committee shall disclose the information specified in 2 U.S.C. § 434(b).

The Act defines in-kind contributions as, *inter alia*, expenditures made by any person “in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents.” 2 U.S.C. § 441a(a)(7)(B)(i). Under 11 C.F.R. § 109.21, a communication is coordinated if it: (1) is paid for by a person other than the candidate or candidate’s committee; (2) satisfies one or more of the four content standards set forth at 11 C.F.R. § 109.21(c); and (3) satisfies one or more of the six conduct standards set forth at 11 C.F.R. § 109.21(d).

In the summer of 2003, Oberweis Dairy, under the guidance of President and CEO Robert Renault, began its first television advertisement campaign in its 75-year history. The campaign consisted of television advertisements that aired in the Chicago area on local and cable television shows. Oberweis Dairy acknowledges that it ran a television advertisement, “Sunny Side Up,” in December 2003 and January 2004, which was within 120 days of the March 16, 2004, primary election. The advertisement featured Mr. Oberweis making breakfast for a pair of home delivery customers.

A. **The “Sunny Side Up” Advertisement Meets the first Prong of the Coordination Test at 11 C.F.R. § 109.21.**

Oberweis Dairy admits that it paid for the production and airing of the television advertisement. Thus, the advertisement meets the first prong of the coordination test at 11 C.F.R. § 109.21(a)(1)(communications paid for by a person other than the candidate or candidate’s committee).

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B. The “Sunny Side Up” Advertisement Appears to Meet the Content Requirement of 11 C.F.R. § 109.21(c).

A communication satisfies the content standard if it is, *inter alia*, a public communication that (i) refers to a political party or clearly identified candidate for Federal Office, (ii) is disseminated within 120 days of an election, and (iii) is targeted to voters in the jurisdiction of the clearly identified candidate. 11 C.F.R. § 109.21(c)(4).

As a threshold matter, the advertisement appears to be a public communication. The “Sunny Side Up” advertisement was broadcast in the television markets encompassing Champaign, Springfield, Peoria and Bloomington, Illinois. News reports state that Oberweis Dairy advertisements aired on television and cable, during programs “such as The Today Show and The Oprah Winfrey Show, and cable networks including HGTV, Lifetime, TLC and The Food Channel.” Thus, the advertisement meets the definition of a public communication because it was disseminated “by means of any broadcast, cable, or satellite communication.” 11 C.F.R. § 100.26.

Next, Mr. Oberweis is clearly identified in the “Sunny Side Up” advertisement. 11 C.F.R. § 109.21(c)(4)(i). The definition of “clearly identified candidate” includes, *inter alia*, the name or photograph of the candidate. See 11 C.F.R. § 100.17. In this case, respondents concede that Mr. Oberweis appeared in Oberweis Dairy’s advertisements. There is no requirement that the candidate be clearly identified as a candidate running for office or that the advertisement contain any political message. In addition, the fact that the candidate may be referred to by another title, such as chairman of a company, does not render the candidate any

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less clearly identified. Thus, the element is satisfied if the person running for office appears in the communication.

Additionally, 11 C.F.R. § 109.21(c)(4)(ii) is satisfied because Oberweis Dairy admits it ran this advertisement within 120 days of the March 16, 2004 primary election. Oberweis Dairy stated, "the 'Sunny Side Up' advertisement ran after November 2003, and it ceased running in January 2004."

Finally, "Sunny Side Up" was targeted to Illinois voters within the meaning of 11 C.F.R. § 109.21(c)(4)(iii). A communication is "directed to" voters in the jurisdiction of a Senate candidate if it is distributed or broadcast anywhere within the state in which the candidate is running. Coordination E&J, 68 Fed. Reg. 421-01, 431. *See also* Advisory Opinion 2004-29. Oberweis Dairy acknowledges that the advertisement was broadcast in Illinois, specifically in the Champaign, Springfield, Peoria and Bloomington, Illinois television markets.

Thus, because Oberweis Dairy aired the "Sunny Side Up" television advertisement, which clearly identifies Mr. Oberweis, in Illinois within 120 days of the primary election, the "content" element of section 109.21 appears to be satisfied.

C. **The "Sunny Side Up" Advertisement Appears to Meet the Conduct Requirement of 11 C.F.R. § 109.21(d).**

Communications that meet the conduct standards of section 109.21(d) include, *inter alia*, those made with the material involvement of a candidate. 11 C.F.R. § 109.21(d)(2). In a recent Advisory Opinion, the Commission stated that a candidate's appearance in a communication would be sufficient to conclude that the candidate was materially involved in decisions regarding that communication. In Advisory Opinion 2003-25, the Commission determined that the

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appearance of a U.S. Senator in an advertisement endorsing a mayoral candidate showed sufficient involvement by the Senator to satisfy the “materially involved” conduct standard. *See also* Advisory Opinions 2004-1 and 2004-29 (citing with approval Advisory Opinion 2003-25). Mr. Oberweis’ appearance in “Sunny Side Up,” is therefore sufficient to meet the conduct standard.

Therefore, there is reason to believe James D. Oberweis and Oberweis for U.S. Senate 2004 and Richard G. Hawks, as treasurer, violated 2 U.S.C. § 441b. Furthermore, there is reason to believe Oberweis for U.S. Senate 2004 and Richard G. Hawks, as treasurer, violated 2 U.S.C. § 434(b).

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